



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 5, 2003

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P. O. Box 149030
Austin, Texas 78714-9030

OR2003-0767

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176061.

The Department of Human Services (the "department") received a written request for the "Sept/Oct 2002 Survey report" regarding Total Home Care, Inc. ("Total Home Care"), which you indicate is a home and community support services agency regulated by the department pursuant to chapter 142 of the Health and Safety Code. You state that some of the responsive information will be released to the requestor. You state that, in accordance with Open Records Letter No. 2001-5348 (2001), you have withheld from the requestor "reports, records, and working papers" and the Total Home Care representative's signature contained in HCFA Form 2567, which are made confidential under section 142.009(d) of the Health and Safety Code. Because the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, Open Records Letter 2001-5348 constitutes a previous determination for purposes of section 552.301(a) of the Government Code.¹ Accordingly, we need not further address the public nature of that

¹The five criteria for this type of "previous determination" are 1) the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision; 2) the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested; 3) the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act; 4) the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and 5) the previous decision

information. You contend, however, that certain information contained in documents you submitted to this office as also being responsive to the records request is made confidential under section 142.009 and section 159.002 of the Occupations Code and thus must be withheld from the public pursuant to section 552.101 of the Government Code.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.) Section 142.009(c) of the Health and Safety Code authorizes the department to conduct investigations of complaints regarding the provision of home and community support services agencies. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [section 142.009 of the Health and Safety Code] are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
- (5) *on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency.*

Health & Safety Code § 142.009(d) (emphasis added). You have submitted to this office a "state form" contemplated by section 142.009(d)(5) of the Health and Safety Code. We agree that the department must withhold the identifying information you have marked pursuant to section 142.009(d)(5).

As noted above, you also contend that certain information contained in the state form is made confidential under section 159.002 of the Occupations Code, which provides in pertinent part as follows:

explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information that is subject to section 159.002 confidentiality includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). You have highlighted the information contained in the submitted records that you seek to withhold pursuant to section 159.002. We agree that most of the information you highlighted may be disclosed only in accordance with chapter 159 of the Occupations Code. However, we have marked in brackets the highlighted information that was not derived from medical records and therefore must be released.

In summary, the department must withhold most of the information you have highlighted in the submitted records pursuant to section 142.009(d)(5) of the Health and Safety Code and section 159.002 of the Occupations Code. However, the information we have marked in brackets must be released along with the remaining submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

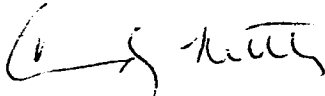
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy M. Nettles
Assistant Attorney General
Open Records Division

CMN/RWP/lmt

Ref: ID# 176061

Enc: Submitted documents

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(w/o enclosures)